MOTION FILED
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(3)

Supreme Court No. 97-1346

In The

Supreme Court of the United States

ROBERT CABRAL,

v.

HEALY TIBBITTS BUILDERS, INC.,

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* INLAND BOATMEN'S UNION OF THE PACIFIC, COLUMBIA RIVER REGION IN SUPPORT OF PETITIONER ROBERT CABRAL

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Movant, Inland Boatmen's Union of the Pacific, Columbia River Region (IBU), moves the Court for permission to file an *amicus curiae* brief in support of the Petition for Writ of Certiorari filed by Robert Cabral.

Petitioner has given his consent to the filing of movant's proposed brief, and a copy of his attorney's letter granting consent is being filed with the Clerk of the Court. Respondent has not consented to the filing of this brief. Movant accordingly files this motion pursuant to Rules 21.2(b) and 37.2.

Movant is a labor union consisting of 485 members. Most of this union's members work as "brown water" seamen plying the inland navigable waters of the Pacific Northwest (the Columbia, Snake and Willamette Rivers) as operators and deckhands on tugboats and towboats.

The Inland Boatmen's Union of the Pacific (IBU) was organized in San Francisco, California on November 20, 1918. From 1918 through December 1931, the activities of the union were confined to the San Francisco Bay area. Divisions of the union were then founded in the Columbia River area and the Puget Sound area. Today, the IBU represents members working over the entire area encompassing states bordering the Pacific Ocean.

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From September 1937 until April 1, 1948, the Union was affiliated with the Congress of Industrial Organizations (CIO). On April 1, 1948, the Union became affiliated with the Seafarer's International Union of North America. This affiliation was terminated in December 1979. On October 31, 1980, the IBU affiliated with the International Longshoreman's and Warehouseman's Union (ILWU).

Since the 1950's, the tugboat and ferryboat industries have increased in size in correlation with an increase in the amount of interstate and oceangoing commerce in the Pacific Ocean area. The IBU represents its members in a united effort to achieve uniformity in wages, hours and working conditions for those people employed in these maritime industries.

The decision from the Ninth Circuit in the present case is particularly alarming to the IBU - Columbia River Region. As is detailed in movant's proposed *amicus curiae* brief, the members of this union face the same risks and dangers as those encountered by "blue water" seamen, and should be entitled to the same protection under the Jones Act as "blue water" seamen. The IBU is particularly concerned with access to the courts for its members, and with the Jones Act and its traditional application to "brown water" seamen.

For these reasons, movant respectfully requests leave to file the attached *amicus curiae* brief in support of the petition for certiorari filed by Robert Cabral.

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BRIEF OF *AMICUS CURIAE* INLAND BOATMEN'S UNION OF THE PACIFIC, COLUMBIA RIVER REGION IN SUPPORT OF PETITIONER ROBERT CABRAL[1]

[1] This *amicus* has received consent from Petitioner, but not from Respondent, to file this brief. Accordingly, *amicus* has filed a Motion for Leave to File this brief. This proposed brief has been filed within the time allowed for filing a brief in opposition to the Petition for Writ of Certiorari.

INTEREST OF AMICUS CURIAE[2]

The interest of *amicus curiae* Inland Boatmen's Union of the Pacific, Columbia River Region is described in detail in the Motion for Leave to File this brief.

ARGUMENT

EXCLUDING "BROWN WATER" SEAMEN FROM COVERAGE UNDER THE JONES ACT RUNS AFOUL OF THE COURT'S HISTORICAL DEVELOPMENT OF THE ADMIRALTY JURISDICTION.

At the time of the adoption of the Constitution, the admiralty law of the United States was essentially the same as that of England. *The Steamboat Thomas Jefferson*, 23 US 428 (1825). In England, the term "navigable waters" meant waters that were subject to the ebb and flow of the tide. *Id.* That rule had developed because, in England, waters beyond the ebb and flow of the tide were generally not navigable in fact. *The Propeller Genesee Chief v. Fitzhugh*, 53 US (12 How.) 443, 454 (1851). That is not, however, the case in the United States.

In *Illinois Central Railroad v. Illinois*, 146 US 387, 406 n3 (1892), Justice Field stated the distinction well:

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[2] Pursuant to Rule 37.6, this amicus attests that no counsel for either party authored the brief, in whole or in part, nor has any party or its counsel made a monetary contribution to the preparation or submission of this brief.

> The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of rivers, and that is found in their navigable capacity.

An early Commission of Vice-Admiral to Lord Cornbury, Governor of New York (then a British colony) described the Admiralty jurisdiction of that colony as including "the public streams, ports, rivers, fresh waters and creeks whatsoever within our maritime jurisdiction aforesaid . . ." ELIJAH E. JHIRAD AND ALEXANDER SANN, BENEDICT ON ADMIRALTY, Chapter 5-10, § 65 (7th Ed. 1974).

In *Waring v. Clarke*, 46 US (5 How.) 441 (1847), the Court sustained admiralty jurisdiction over a collision between two vessels on the Mississippi River 90 miles above New Orleans. The Court observed that the admiralty jurisdiction "extends to tide waters, as far as the tide flows, though it may be infra corpus comitatus." ["within the body of a county"] 46 US at 464.

In *The Propeller Genesee Chief v. Fitzhugh*, *supra*, the Court completed the cycle and overruled *The Steamboat Thomas Jefferson*. *Fitzhugh* was a negligence and property damage case arising from a collision between two vessels on Lake Ontario. The Court was called upon to determine whether an 1845 Act of Congress (5 Stat. at Large 726), extending the jurisdiction of the district courts to certain cases upon the Great Lakes and navigable waters connecting the Great Lakes, was Constitutional. Chief Justice Taney posed the question as follows:

> If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted.
>
> If the meaning of these terms was now for the first time brought before this court for consideration, there could, we think, be no hesitation in saying that the lakes and their connecting

> waters were embraced in them. These lakes are in truth inland seas. Different states border on them on one side, and a foreign nation on the other. A great and growing commerce is carried upon them between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have been encountered on them, and prizes have been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas, applies with equal force to the lakes.
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> - *The Propeller Genesee Chief v. Fitzhugh*, 53 US at 453.

Noting with some "embarrassment," 53 US at 456, the precedent of *The Steamboat Thomas Jefferson, supra*, the Court held that "The lakes and waters connecting them are undoubtedly public waters; and we think are within the grant of admiralty and maritime jurisdiction in the Constitution of the United States." 53 US at 457. *And see Jackson v. The Steamboat Magnolia*, 61 US (20 How.) 296 (1857); *The Eagle*, 75 US (8 Wall.) 15 (1868).[3]

The significance of the historical development of the admiralty jurisdiction in this

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[3] The "tidal test," incidentally, has long since been abandoned in England as well. GUSTAVUS H. ROBINSON, ROBINSON ON ADMIRALTY 33 n41 (1939).

country is that The Jones Act, 46 USC § 688, was passed in 1920 to afford protection to all seamen plying in "navigable waters." *Swanson v. Marrra Brothers, Inc.*, 328 US 1, 7 (1946). The Jones Act, in extending the right of recovery to seamen injured by negligence while in the service of a vessel, "...did not go beyond modification of substantive rules of the maritime law well within the scope of the admiralty jurisdiction." *O'Donnell v. Great Lakes Dredge and Dock Co.*, 318 US 36, 43 (1943). The Jones Act is liberally construed to carry out its purpose, which was to enlarge protection for seamen, who are the "wards of admiralty." *Garrett v. Moore-McCormack Co.*, 317 US 239, 247, 248 (1942).

In other words, although most of the cases cited above interpret the scope of the admiralty jurisdiction under Article III, § 2 of the United States Constitution, and not the Jones Act specifically, they constitute the base of maritime law on which the seaman's rights under the Jones Act are built. "The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters." *O'Donnell, supra*, 318 US at 42, 43.

The Ninth Circuit decision here runs contrary to the Court's historical development of the admiralty jurisdiction in extending it to cover all navigable waters. "Brown water" seamen, as noted by Chief Justice Taney, in *The Propelller*

Genesee v. Fitzhugh, *supra*, face the same risks and dangers as those seamen who work on vessels in the ocean. 53 US at 453.

Under the general admiralty law, several cases have interpreted the term "perils of the sea" (usually in the context of insurance) to include those perils faced on inland waterways. *See, e.g. Delano Coal Co. Inc. v. Barge Blue Rock*, 1928 AMC 1359 (SDNY)(A broken plank on a barge traveling up the North River held to be the result of a peril of the sea); *Klein v. Globe & Rutgers Fire Insurance*, 2 F.2d 137 (CA 3 1924)(A steamer being towed on the Mississippi River sprang a leak after rough waters overnight gave the vessel "a good shaking up." The damage was held to be caused by a "peril of the sea" rather than unseaworthiness.); *Spooner & Son v. Connecticut Fire Insurance Co.*, 314 F.2d 753 (CA 2 1963)(Crane barge on the East River; unanticipated swells were a "peril of the sea.")

The assertion that only blue water seamen face the risks and dangers associated with "going down to sea" is belied by this nation's history of tragedies on inland waterways. For example, the greatest ever loss of passengers "at sea" occurred when the EMPRESS OF IRELAND sank in the Saint Lawrence River on May 18, 1914. Over 1,000 lives were lost when the vessel collided with the Norwegian coal freighter STORSTAD in a thick fog. This disaster happened, ironically, after passengers had been assured that one-third of their voyage from Quebec to Liverpool would be passed "in the relative tranquility of a great inland

sea." JAMES CROALL, FOURTEEN MINUTES, THE LAST VOYAGE OF THE EMPRESS OF IRELAND 11 (1978).

Perhaps the most famous of this country's disasters at sea was the wreck of the EDMUND FITZGERALD. On November 10, 1975, the 729-foot, 25,891 ton vessel was torn apart, literally twisted in half by gale winds of up to 90 miles per hour on Lake Superior. There were no survivors of her crew of 29. ROBERT J. HEMMING, GALES OF NOVEMBER, THE SINKING OF THE EDMUND FITZGERALD (1981). *And see* DAVID D. SWAYZE, SHIPWRECK! A COMPREHENSIVE DIRECTORY OF OVER 3,700 SHIPWRECKS ON THE GREAT LAKES (1992).

Many of our nation's larger lakes and rivers are indeed "inland seas." 53 US at 453. Therefore, the term "go down to sea," as used by the Court in its most recent cases on this subject[4], and by the Ninth Circuit in this case, (*see* Appendix to Petition for Writ of Certiorari at 10a), must necessarily include working as a seaman on this country's vast network of navigable harbors, lakes, rivers and streams.

The term "sea" is a word of "wide extension and application." BENEDICT ON ADMIRALTY, Ch. 7-6, § 103. "Its classical and scriptural equivalents are applied to all sorts of navigable waters. It is not restricted, even in the common speech, to waters where the tide ebbs and flows, for the Baltic Sea, the Black Sea, the Sea of Azof, the Sea of Mamora,

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[4] *Chandris v. Latsis*, 515 US 347, 115 SCt at 2190 (1995); *Harbor Tug and Barge Co. v. Papai*, 117 SCt 1535, 1540 (1997)("The inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea.")

the Mediterranean Sea, the great scenes of early maritime enterprise, had no visible tide." *Id.*

The Court should recognize its precedent with regard to navigable waters in conjunction with the scope of the admiralty jurisdiction by declaring that "brown water" seamen are entitled to the same protections as their blue water kin. Any other rule would return the Court to the antiquated English rule in which the admiralty jurisdiction was governed by the ebb and flow of the tide.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

DATED: April 20, 1998.

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